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CLEARINGHOUSE RULE 94-210

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. In s. NR 422.02 (47), “applied” should not be underscored since it is part of the current rule.

b. In the first line of the Note following s. NR 422.20 (1), “will” should replace “shall,” since this is a description rather than a requirement. If it is a requirement, it should be in the text of the rule rather than in a note.

c. SECTION 8 amends s. NR 484.10 (9). Since s. NR 484.10 does not exist, the treatment of the Administrative Code by SECTION 8 is misplaced.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The rule incorporates ASTM standard D523-89 by reference. See s. NR 422.02 (17m) and (28e). Consent for incorporation of this standard must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. The analysis accompanying the rule should indicate that this consent has been given.

b. Section NR 422.02 (53) refers to a pesticide product registered by the Environmental Protection Agency (EPA). This paragraph should cite the specific Code of Federal Regulations provision under which the EPA registers these pesticide products. In addition, the Department of Agriculture, Trade and Consumer Protection may register a pesticide under s. 94.70 (1) (a),

Stats. The department should review the state pesticide registration laws and procedures to determine whether state registration should also be referenced in s. NR 422.02 (53).

c. Section NR 484.10 (9) references the incorporation by reference of ASTM standard D523-89 for s. NR 422.02 (45) and (78). Subsections (45) and (78) do not contain a reference to this ASTM standard; subs. (17n) and (28e) do.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The department should review the following comments relating to the punctuation in the rule and, as appropriate, amend the rule:

- (1) In s. NR 422.02 (intro.), the second sentence should end with a colon rather than a period.
- (2) In s. NR 422.02 (4m), the last comma should be deleted.

b. The reference to “of stationary sources” in the phrase “appurtenances of stationary sources” in s. NR 422.02 (2s) is redundant, as the definition of “appurtenance” in s. NR 422.02 (2m) refers to accessories to a stationary structure. Compare the text of s. NR 422.02 (2s) to the phrase “application to any stationary structure or appurtenance” in s. NR 422.20 (1).

c. The rule contains a number of provisions that are not clear. The department should review the entire rule and revise it as necessary to ensure its clarity. Examples of these provisions include the following:

- (1) Does the definition of “architectural coating” in s. NR 422.02 (2s) apply to surface coatings formulated for the application to the exterior or interior, or both, of stationary structures? Also, in this definition, if the phrase “including...buildings, bridges, houses and signs” at the end of the definition is intended to modify “stationary structures,” rather than “appurtenances,” then this phrase should be positioned adjacent to “stationary structures” to remove any ambiguity.
- (2) The phrase “exposed to aggressive environments” in the definition of “industrial maintenance coating” in s. NR 422.02 (21q) is ambiguous. Can this definition be simplified and still be complete by deleting the phrase “exposed to aggressive environments in which” in this definition?
- (3) Is every category of coating listed in Table 1 an architectural coating? The text of s. NR 422.20 (1), (2) (b) and (3) (a) and (b) imply that that is the department’s intent. However, many of the definitions in s. NR 422.02 of various categories of coatings do not clearly establish that the coating is an architectural coating. See, for example, the definitions of “bituminous primer” in s. NR 422.02 (4v), “flat coating” in s. NR 422.02 (17m) and “metallic pigmented coating” in s. NR 422.02 (27g). Compare these definitions with the definition of “industrial maintenance coating” in s. NR 422.02

(21q), which explicitly defines this coating to be a type of architectural coating.

- (4) As drafted, the emission limitation in s. NR 422.20 (3) (a), which restricts a person from offering for sale the specified architectural coatings, applies to the offering for retail or wholesale sale. Similarly, the consumer information required under s. NR 422.20 (4) applies to the offering for retail or wholesale sale of the specified architectural coatings. If the department intends this emission limitation or consumer information requirement not to apply to both of these types of sale, then the rule should be revised accordingly.
- (5) The use of the phrase “any coating subject to this section” to establish the applicability of the recordkeeping requirements in s. NR 422.20 (5) (a) 1 and (b) is potentially ambiguous. One reading of the rule is that “coatings subject to this section” are any architectural coatings listed in Table 1 that are manufactured after January 1, 1996 and have a VOC content greater than the applicable limits specified in Table 1. See the emission limitation established in s. NR 422.20 (3) (a). This interpretation excludes from the phrase “any coating subject to this section” the limitation to architectural coatings supplied, offered for sale or used in any county identified in s. NR 422.20 (1). One alternative would be to define “coatings subject to this section.” Neither alternative would be to identify the person subject to the recordkeeping requirements by reference to those subject to the emission limitations, e.g., in s. NR 422.20 (5) (a) 1, “Any person subject to sub. (3) (a) shall maintain...” and to modify, as appropriate, the text of subd. 1. a., b. and c.
- (6) The recordkeeping requirements in s. NR 422.20 (5) (a) 1 (intro.) and (b) require the affected persons to maintain the specified records for the “most recent consecutive 3-year period.” This requirement means that, upon the rule becoming effective, the affected persons must have maintained the specified records for the previous three years. Should the rule specify a transition and what happens if the person did not maintain the required information because, prior to the effective date of the rule, there was no requirement to maintain it.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

The department should consider repeating the content of the Note following s. NR 422.20 (1) in the analysis accompanying the rule to alert the reader more directly that EPA emission standards for architectural and industrial maintenance coatings may be forthcoming. In addition, if the rule is based upon EPA guidelines, the department should consider indicating that fact in the analysis accompanying the rule as well as providing an analysis of how the state rule and federal guidelines conflict or compare.